90-1127

No.

Supreme Court, U.S.
FILED
JAN 14 1991
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RAILWAY LABOR EXECUTIVES' ASSOCIATION and
UNITED TRANSPORTATION UNION,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

CHICAGO AND NORTH WESTERN TRANSPORTATION CO.,
ITEL CORPORATION and FRVR CORPORATION,
Intervenors.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.
RICHARD S. EDELMAN *
HIGHSAW, MAHONEY &
CLARKE, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500
Attorneys for Petitioners

* Counsel of Record

Date: January 14, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

® 60

QUESTIONS PRESENTED

1. Whether a holding company that controls one railroad and wishes to acquire a railroad line from another railroad can evade the requirements of 49 U.S.C. §§ 11343, 11344 and 11347, concerning transactions between railroads and involving control of railroads, and thereby avoid its statutory obligations under 49 U.S.C. § 11347 to employees affected by that acquisition, simply by the device of creating a new subsidiary to acquire the line and later operate it as another railroad subsidiary of the holding company?

2. Whether the Interstate Commerce Commission can treat the holding company's control of the newly-created subsidiary railroad, which must be approved under 49 U.S.C. §§ 11343 and 11344, and which must be subject to obligations for the protection of adversely affected employees under 49 U.S.C. § 11347, as a transaction totally separate from and unrelated to the subsidiary corporation's acquisition of the rail line, where such treatment serves no purpose except to deprive adversely affected employees of the selling railroad of protections mandated by Section 11347?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
A. The *FRVR* Case	4
B. The *B&P* Case	6
PROCEEDINGS BELOW	7
A. The *FRVR* Decision	7
B. The *B&P* Decision	9
REASONS FOR GRANTING THE WRIT	11
I. THE COURT OF APPEALS' DECISIONS CONFLICT WITH LONG ESTABLISHED PRECEDENT OF THIS COURT	13
II. BECAUSE THESE CASES INVOLVE AN ISSUE IMPORTANT TO THE ENTIRE RAILROAD INDUSTRY, THE COURT SHOULD GRANT THIS PETITION TO AGAIN CLARIFY THE REQUIREMENTS OF THE ICA CONCERNING TRANSACTIONS BETWEEN RAIL CARRIERS AND INVOLVING CONTROL OF RAIL CARRIERS TO REQUIRE THAT THE ICC INSURE FULL COMPLIANCE WITH THOSE REQUIREMENTS	25
CONCLUSION	30

TABLE OF AUTHORITIES

CASES: Page

Allegheny Corp. v. Breswick & Co., 353 U.S. 151 (1957) ..... *passim*
Anderson v. Abbott, 321 U.S. 349 (1943) 20
Black v. ICC, 762 F.2d 106 (D.C. Cir. 1985) 4, 26
Burlington Northern, Inc.—Control and Merger—St. Louis San Francisco Ry., 360 I.C.C. 788 (1980), *aff'd, Missouri-Kansas-Texas R.R. v. United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981) 22
Chevron, U.S.A. v. Natural Resources Defense Council, 476 U.S. 837 (1984) 24
County of Marin v. United States, 350 U.S. 412 (1958) ..... *passim*
Crounse Corp. v. ICC, 781 F.2d 1176 (6th Cir.), *cert. denied*, 107 S.Ct. 290 (1986) 22
Electric Bond Share Co. v. SEC, 363 I.C.C. 292 (1979) 20
Ex Parte 392 (Sub-No. 1) Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985), *aff'd sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) 4, 27, 30
Gilbertville Trucking Co. v. United States, 371 U.S. 115 (1962) 12, 15
Guilford Transp. Indus., Inc.—Control—B&M Corp., 366 I.C.C. 292 (1982), *aff'd sub nom. Lamoille Valley R.R. v. ICC*, 711 F.2d 295 (D.C. Cir. 1983) 22
MidSouth Corp.—Continuance In Control Exemption—Southeastern Rail Corp., F. D. No. 31186 (served February 12, 1988), *aff'd sub nom. Railway Labor Executives' Ass'n v. ICC*, 869 F.2d 1492 (6th Cir. 1989) (Table) 28
New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979) 4
Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n, 491 U.S. ——, 105 L. Ed.2d 415 (1989) 4
Railway Labor Executives' Ass'n v. United States, 339 U.S. 142 (1950) 13

TABLE OF AUTHORITIES—Continued

	Page
Rio Grande Indus., Inc.—Purchase and Related Trackage Rights—Soo Line Between Kansas City Mo. and Chicago, Ill., No. 31505, Decision 6 (served November 15, 1989) (unreported)	26, 27
Rio Grande Indus., Inc.—Purchase and Trackage Rights—Chicago, Missouri & Western Ry., 5 I.C.C.2d 952 (1989)	26-27
Schenley Distillers Corp. v. United States, 326 U.S. 432 (1946)	20
Southeastern Rail Corp.—Acquisition and Operation Exemption—Gulf and Mississippi R.R., Finance Docket No. 31187 (served August 31, 1989), *aff'd sub nom. BLE v. ICC*, 909 F.2d 909 (6th Cir. 1990)	28
United States v. Marshal Transport Co., 322 U.S. 31 (1943)	*passim*
United States v. Missouri Pac. R.R., 278 U.S. 269 (1929)	24

STATUTES AND OTHER AUTHORITIES:

Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*	*passim*
Section 10505, 49 U.S.C. § 10505	3, 6
Section 10505(g), 49 U.S.C. § 10505(g)	6
Section 10901, 49 U.S.C. § 10901	3, 4
Section 11343, 49 U.S.C. § 11343	*passim*
Section 11344, 49 U.S.C. § 11344	3, 6, 29
Section 11347, 49 U.S.C. § 11347	*passim*
former Section 5(2)(f)	12, 23
P.L. No. 95-473, 92 Stat. 1337	11, 23
Section 3, 92 Stat. 1446	11, 23
28 U.S.C. § 1254(1)	3
28 U.S.C. § 2101(c)	3
28 U.S.C. § 2350	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No.

RAILWAY LABOR EXECUTIVES' ASSOCIATION and
UNITED TRANSPORTATION UNION,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

CHICAGO AND NORTH WESTERN TRANSPORTATION CO.,
ITEL CORPORATION and FRVR CORPORATION,
Intervenors.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners, the Railway Labor Executives' Association and the United Transportation Union (collectively referred to herein as "Rail Labor")[1] respectfully request that this Court issue a writ of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia Circuit, entered on September 14, 1990 in *Railway Labor Executives' Ass'n v. ICC*, D.C. Cir. Nos. 88-1793 and 89-1183, and on October 30, 1990

---

[1] The Railway Labor Executives' Association ("RLEA") is a voluntary association of the chief executive officers of all of the standard national rail unions in the United States except for the United Transportation Union ("UTU").

in *Railway Labor Executives' Ass'n v. ICC*, D.C. Cir. No. 89-1436.

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit in Case Nos. 88-1793 and 89-1183 ("*FRVR*") is reported at 914 F.2d 276, and is reprinted as Appendix A hereto at 1a-19a. The decisions of the Interstate Commerce Commission ("ICC") which were the subject of that court of appeals' decision, *Itel Rail Corp. and Itel Corp.—Continuance In Control Exemption—FRVR Corp.*, Finance Docket No. 31206 (served September 12, 1988), and *FRVR Corp.—Acquisition and Operations Exemption—Chicago and North Western Transp. Co.*, Finance Docket No. 31205 (served February 8, 1989), are not reported; those decisions are reprinted at Appendices B and C hereto at 20a-35a and 36a-51a.

The decision of the United States Court of Appeals for the District of Columbia Circuit in case no. 89-1436 ("*B&P*"), is a *per curiam* decision which was based upon that court's prior decision in *FRVR* and it is not reported; the judgment entered by that court is reprinted as Appendix D hereto at 52a. The ICC decision which was the subject of that court of appeals' decision, *Buffalo & Pittsburgh R.R.—Acquisition and Operation of Lines in New York and Pennsylvania, Genessee & Wyoming Indus., Inc., the Aruthur T. Walker Estate Corp. and Dumaines and Buffalo & Pittsburgh R.R.—Exemption Control*, Finance Docket Nos. 31116 and 31117, (served July 10, 1989), is not reported; that decision is reprinted as Appendix E hereto at 54a-83a.

JURISDICTION

The Court of Appeals' decision in *FRVR* was entered on September 14, 1990. Petitioners asked this Court to extend the time in which to file their petition until January 14, 1991. On December 4, 1990, Mr. Chief Justice

Rehnquist granted that request. Sup. Ct. No. A-425. That extension, totaling thirty-two (32) days, is within the time period authorized by 28 U.S.C. 2101(c), and this petition has been filed within that extended time period. The Court of Appeals' decision in *B&P* was entered on October 30, 1990. RLEA has timely petitioned for review of that decision.

In both cases, petitioners are seeking to invoke this Court's jurisdiction under 28 U.S.C. §§ 1254(1) and 2350.

STATUTES INVOLVED

These cases involve the interpretation and application of several provisions of the Interstate Commerce Act ("ICA"), 49 U.S.C. § 10101, *et seq.* The provisions at issue are 49 U.S.C. §§ 10505, 10901, 11343, 11344 and 11347. Those provisions are reproduced in full in Appendix F to this Petition at 84a-91a.

STATEMENT OF THE CASE

This petition involves ICC decisions in two cases which, for purposes of the issues presented, are identical in all material respects. At issue are provisions of the ICA governing acquisitions of rail lines and acquisitions of control of rail carriers. Certain transactions involving rail carriers may not be carried out without prior approval and authorization by the ICC under 49 U.S.C. §§ 11343 and 11344. Among such transactions are the purchase of property of one carrier by another carrier, including rail lines (§ 11343(a)(2)), the acquisition of control of two carriers by a person that is not a carrier (§ 11343(a)(4)) and the acquisition of control of a carrier by a person that it not a carrier but that controls carriers (§ 11343(a)(5)). Any transaction which is governed by Section 11343 must be authorized under Section 11344 and is subject to the requirement of Section 11347 that the Commission condition its authorization of such trans-

actions upon provision of arrangements for the protection of adversely affected employees.[2]

Section 10901 of the ICA has been held by various courts of appeals to govern acquisitions of railroad lines by entities which are not carriers. *See e.g., Black v. ICC*, 762 F.2d 106, 115 (D.C. Cir. 1985). Although such transactions are not subject to mandatory employee protective arrangements, the Commission has discretion to impose them. *Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 491 U.S. ——, 105 L. Ed.2d 415, 427 (1989). By its order in *Ex Parte 392 (Sub-No. 1) Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), *review denied sub nom. Illinois Commerce Comm'n v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (*"Ex Parte 392"*), the Commission, pursuant to 49 U.S.C. § 10505, exempted all transactions which are governed by Section 10901 from prior ICC approval, and substituted an expedited procedure whereby such transactions can be consummated shortly after the filing of a notice of exemption. Furthermore, the Commission has stated that it will impose employee protective conditions in such transactions only in what it would consider to be "exceptional circumstances." *Pittsburgh & Lake Erie*, 105 L. Ed.2d at 427-428.

A. The *FRVR* Case

In *FRVR*, the RLEA and the UTU challenged an ICC decision concerning the acquisition by FRVR Corp. ("FRVR") of certain lines of railroad which were owned

---

[2] The minimum protective arrangements mandated by Section 11347 include priority in hiring, preservation of collective bargaining rights, employment rights and protection against a worsening of pay and benefits, including compensation for loss of employment or compensation in the form of payment of the differential between what an employee actually earned and what he or she would have earned, but for the transaction. *See e.g., New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

by the Chicago and North Western Transportation Co. ("CNW"), a Class I rail carrier which operates a rail system in the midwestern United States. RLEA and UTU also challenged an ICC decision concerning the continued control of FRVR, which was newly formed for the purpose of acquiring CNW's lines, by its corporate parents, Itel Corp. and Itel Rail Corp. ("Itel" and "Itel Rail"), holding companies that already controlled several rail carriers. App. A at 1a, 5a-6a.

The transaction between FRVR and CNW involved FRVR's acquisition of approximately 200 miles of CNW's rail lines, between Green Bay and Milwaukee, Wisconsin. The purchase price for the lines was approximately $61 million; $14 million was provided by an equity contribution from Itel or Itel Rail, and $47 million was provided by a loan secured by the CNW property acquired by FRVR and guaranteed by Itel Rail. App. A at 5a.

When it formed FRVR, Itel Rail already owned several rail carriers including the Green Bay and Western Railroad Company ("GB&W"), which operates over approximately 250 miles of trackage between Green Bay and East Winona, Wisconsin. As a result of FRVR's acquisition of CNW's lines, the two Itel Rail subsidiaries connected at Green Bay, and GB&W could interchange traffic with a corporate affiliate to provide service to Milwaukee. App. A at 5a.

FRVR acquired CNW's lines by invoking the *Ex Parte 392* class exemption of non-carrier acquisitions of rail lines from prior approval under 49 U.S.C. § 10901; the acquisition therefore was not subject to any statutorily mandated requirements for arrangements for the protection of CNW employees affected by the transaction and the ICC refused to exercise its discretion to impose such protections. App. A at 6a. Because FRVR's consummation of its acquisition of CNW's lines would result in Itel and Itel Rail obtaining control of another carrier, the control of FRVR by Itel and Itel Rail was subject to ICC

approval under 49 U.S.C. § 11343(a)(4) and (5). Pursuant to 49 U.S.C. § 10505, the ICC effectively authorized that relationship by exempting it from the prior approval requirements of Sections 11343 and 11344. In accordance with 49 U.S.C. § 10505(g), the ICC stated that the control relationship was subject to employee protective arrangements required by 49 U.S.C. § 11347. However, the Commission held that those protections did not apply to the only employees to be adversely affected in the overall transaction, the employees of the vendor CNW, but were limited to employees of the "Itel system." The ICC reasoned that CNW was not a party to the control proceeding in which the protections were imposed, nor was it a participant in the control relationship. App. A at 6a-7a.

B. The *B&P* Case

In *B&P*, the RLEA challenged an ICC decision concerning the acquisition by the Buffalo and Pittsburgh Railroad Co. ("B&P") of certain lines of railroad owned by CSX Transportation, Inc. ("CSXT"), a Class I rail carrier which operates a rail system throughout the eastern United States. Also, at issue in that case was the continued control of B&P, a corporation newly formed for the purpose of acquiring CSXT's lines, by its holding company parents: Genesse & Wyoming Industries Inc. ("GWI"), which already controlled several rail carriers in New York including the Rochester and Southern Railroad Company ("R&S"), which connects with the lines acquired from CSXT by B&P, as well as a carrier in Louisiana; and the Arthur T. Walker Estate Corporation ("Walker"), which already controlled a rail carrier, the Pittsburgh & Shawmutt Railroad Company ("*P&S*") which also connects with the lines acquired from CSXT by B&P. Walker is, in turn, owned by Dumaines, a New Hampshire trust which also already controlled a rail carrier. App. E at 55a-57a.

B&P acquired 369 miles of CSXT lines between Buffalo, New York and Eidenau, Pennsylvania by exercising a right of first refusal to purchase the northern portion of

those lines which was acquired by GWI in connection with R&S' purchase of CSXT's lines from Rochester to Ashford, N.Y. App. E at 54a-55a, 64a. The price paid for the Buffalo to Eidenau lines was $28.5 million which included $4 million contributed to B&P by GWI and Walker in return for shares in B&P, and the proceeds of a loan secured by all of the assets acquired by B&P (Joint Appendix ("J.A.") in D.C. Cir. No. 89-1436 at 130-131). Under the loan agreement, GWI's and Walker's shares in B&P were pledged to the lender as a condition of the loan to B&P. App. E at 56a; J.A. at 131, 158, 385-86.

PROCEEDINGS BELOW

A. The *FRVR* Decision

In response to FRVR's invocation of the *Ex Parte 392* class exemption for its acquisition of CNW's lines, Rail Labor filed a petition for revocation of that exemption, asserting that because of FRVR's relationship with its corporate parents and affiliates, especially the connecting GB&W, FRVR should have been considered as a carrier and the transaction was subject to regulation under ICA Section 11343 governing sales of lines between carriers. J.A. in D.C. Cir. Nos. 88-1793 and 89-1183 at 668-74.

The ICC denied Rail Labor's petition, concluding that FRVR qualified as a non-carrier under prior Commission precedent which had been affirmed by the Court of Appeals for the District of Columbia Circuit and the Court of Appeals for the Second Circuit. Those decisions held that the regulatory treatment of a non-carrier affiliate is determined by analyzing: 1) whether there are sufficient indicia of the non-carrier's independence from the affiliated corporation [whether the acquiring entity is a separate corporation, will operate as a common carrier by rail, will publish tariffs and stations, will directly serve the line patrons and will be responsible for financial and contractual obligations in its own name]; and 2) whether

the acquiring entity was formed "exclusively" to elude Section 11343. App. B at 33.

The Commission concluded that, notwithstanding the relationship between FRVR and the Itel corporate family, and notwithstanding FRVR's reliance upon its corporate parents for the funds to acquire and begin operation of the CNW lines, an overlap of officers and directors among the Itel corporations and the connection between the GB&W and the CNW lines, FRVR was sufficiently independent of its parents and affiliates to be treated as a non-carrier under Section 10901 because FRVR would have its "own employees, management and equipment," and would "publish its own tariffs and operate under its own name," and because other than Itel's and Itel Rail's guarantees of the loan to acquire the property, FRVR would be responsible for its own financial obligations. App. B at 32a-33a.

The Commission also rejected Rail Labor's request that employee protective arrangements imposed as a condition of Itel's and Itel Rail's continued control of FRVR be applied to CNW employees affected by the line sale because the two transactions were inextricably linked. J.A. at 48-57. The Commission stated that it had excluded CNW employees from coverage under the protective conditions imposed in the control proceedings because "[t]he control transaction directly affects only employees of carriers in the Itel System. CNW was not a party to the control transaction and its employees are not directly affected by it," and because "[t]he fact that CNW was the vendor in the acquisition transaction provides no basis for granting the relief sought here by Rail Labor." App. B at 23a-24a.

The Court of Appeals affirmed both of the Commission's decisions. The Court held that the Commission's indicia of independence test was based upon a reasonable interpretation of the statute, and that the application of that test in this case was not arbitrary, capricious or contrary

to law. App. A at 11a-16a. The Court also held that the Commission properly concluded that there were "substantial business reasons" for the creation of FRVR to acquire CNW's lines so that it could properly be treated as a non-carrier, despite its use to avoid employee protection obligations. App. A at 17a.

Additionally, the Court of Appeals held that the Commission's exclusion of CNW employees from the protections imposed in the FRVR control decision was consistent with prior precedent that such protections do not extend to employees of non-applicant railroads; and that a determination that non-applicant, non-party carriers are not sufficiently involved in a transaction to trigger employee protective obligations was a reasonable interpretation of the statute. App. A at 9a-10a.

B. *The B&P* Decision

As in *FRVR*, the RLEA argued in *B&P* that because of the relationship between the newly-formed acquiring entity and its corporate affiliates, especially the connecting carriers, the Commission was required to treat B&P's acquisition of CSXT's lines as a sale by a carrier to a system of rail carriers. J.A. in D.C. Cir. No. 89-1436 at 81-82. RLEA again urged that the Commission's indicia of independence test was not sufficient to insure enforcement of the express terms and purposes of Sections 11343 and 11347.

The Commission's initial decision authorizing the continued control of B&P by GWI, Walker and Dumaines specifically stated that the employee protective conditions imposed in that transaction "extends only to railroad employees of the carriers controlled or to be controlled directly or indirectly by GWI, Walker and Dumaines and not to the employees of CSXT." J.A. in D.C. Cir. No. 89-1436 at 42. RLEA filed a petition for reopening and reconsideration of that determination, arguing that application of the protective conditions to the CSXT employees on the lines acquired by B&P was required be-

cause the continued control of B&P by GWI, Walker and Dumaines was inextricably linked to B&P's acquisition of the CSXT lines since there was no need for the control authorization without the acquisition. *Id.* at 45-55.

The Commission's decision in B&P rejected both of RLEA's arguments. With respect to B&P's acquisition of CSXT's lines, the Commission held that, notwithstanding the relationships between B&P and its corporate parents and affiliates, the transaction could be treated as a Section 10901 transaction between a carrier and a "non-carrier" because B&P was a separate legal entity formed, at least in part, to insulate its parents from liability, and B&P would own and operate the line in its own name, publish tariffs, directly serve the line's customers, hire its own employees, have officers and directors named in accordance with State law, be responsible for its own financial and contractual obligations and acquire equipment and material in its own name. App. E at 62a-65a. The Commission also stated that "[n]ot imposing costly employee protective conditions on such transactions enables rail carriers to sell marginally profitable lines to new regional or short line carriers who may operate the lines more economically" and that that policy consideration outweighed the interests of the affected employees. App. E at 67a.

The Commission also rejected RLEA's contention that the protections imposed in its authorization of the control of B&P by GWI, Walker and Dumaines should apply to the CSXT employees affected by the related B&P acquisition of CSXT's lines, citing prior Commission decisions which the majority said held that employee protections do not "extend to employees of carriers not party to the Section 11343 transaction which gave rise to the mandatory protection." App. E at 69a-70a.

The Court of Appeals affirmed the Commission's decision in a *per curiam* decision which cited that court's decision in *FRVR*. App. D at 52a-53a.

REASONS FOR GRANTING THE WRIT

Rail Labor submits that this case involves important questions concerning the interpretation and application of the provisions of the Interstate Commerce Act governing transactions between rail carriers and transactions involving the control of rail carriers. 49 U.S.C. §§ 11341-11347. The ICA was successively amended in 1920, 1933 and 1940 specifically to deal with abuses relating to the acquisition of rail lines and the control of rail carriers through various corporate devices which were employed to evade each prior effort at regulation of such transactions. Because of the importance of those provisions of the ICA to the proper operation of that Act, and to effectuation of the often expressed congressional purpose to regulate such transactions, this Court has several times found it necessary to decide questions concerning the interpretation and application of those provisions.

In a series of decisions issued between 1944 and 1962 concerning former Section 5 of the ICA, predecessor to current ICA Sections 11341-11347,[3] this Court consistently and emphatically held that Congress had required that transactions between rail carriers and corporations which control rail carriers, and especially transactions involving the control of rail carriers, be subject to ICC approval under Section 5. The Court further held that Commission analysis of transactions potentially subject to approval under Section 5 could not be limited or determined by corporate formalities or by the form in which the transactions were presented, but rather must depend upon the true nature and practical effects of those transactions so as to prevent evasion of the requirements of Section 5. *United States v. Marshall Transport Co.*, 322 U.S. 31 (1944); *Allegheny Corp. v. Breswick & Co.*, 353 U.S. 156 (1957); *County of Marin*

[3] The ICA was recodified in 1978 and certain changes were made in the language of those provisions, but Congress specifically stated that such changes were not intended to have substantive effect. P.L. 95-473 § 3, 92 Stat. 1466 (1978).

v. United States, 350 U.S. 412 (1958) and *Gilbertville Trucking Co. v. United States*, 371 U.S. 115 (1962).

Rail Labor submits that the decisions below are in direct conflict with the above-cited precedent of this Court, for the ICC and the court of appeals have allowed corporations that control rail carriers to use subsidiaries to acquire rail lines from existing carriers to create interlocking, commonly controlled rail systems without ICC approval under Sections §§ 11343 and 11344. Moreover, the ICC and the Court of Appeals have allowed corporations that control carriers to separate ICC authorization of their control of those subsidiaries from ICC authorization of those subsidiaries' acquisitions of rail lines. However, this Court has held that Commission decisions must be determined by the substance rather than the form of the transactions presented to it. Accordingly, the Commission was required to recognize that the acquisitions and the control relationships were inextricably linked, by either treating the acquisitions as Section 11343 transactions between carriers and systems of commonly controlled carriers, or by treating the acquisitions and the control relationships as inseparable parts of single Section 11343 transactions.

As a consequence of the ICC's failure to treat these acquisitions of rail lines as Section 11343 transactions, and the ICC's separation of these acquisitions from its authorization of the control of those entities by corporations which already controlled carriers, rail carrier systems have been allowed to acquire connecting rail lines from other rail carriers without providing arrangements for the protection of employees affected by those acquisitions, despite the clear and unequivocal mandate of Congress, expressed in Section 11347 of the ICA, that employee protective arrangements be imposed in such situations. Section 11347, the successor to prior ICA Section 5(2)(f), is also the product of a long history of congressional regulation of transactions between carriers and involving control of carriers, and represents a deter-

mined effort to protect railroad workers from the adverse employment consequences of such transactions. *See Railway Labor Executives Ass'n v. United States*, 339 U.S. 142, 146-53 (1949).

Because of the increasing frequency of the use of holding companies and subsidiaries to evade ICC regulation under Sections 11341-11347, because of this Court's consistent recognition of the importance of proper interpretation and application of those provisions of the ICA, and because of the significant impact of such continuing abuse of the ICA, Rail Labor submits that the Court should grant this petition to review and vacate the Court of Appeals' decisions.

I. THE COURT OF APPEALS' DECISIONS CONFLICT WITH LONG ESTABLISHED PRECEDENT OF COURT

This Court has consistently held that ICC analysis and oversight of transactions subject to Section 11343 may not be evaded or limited by the use of holding companies or subsidiary corporations, and that ICC regulation of a transaction may not be determined by the form in which a transaction is presented to the Commission.

In *United States v. Marshall Transport Co.*, *supra*, the Court held that where a subsidiary of a corporation which controlled a carrier acquired the property of another carrier, the acquisition involved the parent corporation's acquisition of control of the vendor carrier, so that the Commission could not consider the propriety of the acquisition in the absence of the parent corporation's application for authority to acquire control of the property of the vendor carrier. 322 U.S. at 32, 35-37, 41-42. The Court specifically rejected the argument that it was sufficient that the subsidiary corporation had sought ICC approval of the transaction.

The decision in *Marshall Transport* was relied upon in *Allegheny Corp. v. Breswick Co.*, *supra*, in which the

Court held that the merger of one railroad, which was indirectly controlled by a holding company, into another railroad which was controlled by the same holding company was subject to ICC approval under Section 5 because the holding company would be obtaining increased control over the indirectly controlled carrier by its merger into the other controlled carrier. That the holding company exercised control over the two carriers through various subsidiaries, and that it already exercised some control over both carriers, did not vitiate the need for ICC approval of the acquisition of control through merger because "[n]ot labels but the nature of the changed relations is crucial in determining whether a rearrangement within a railroad system constitutes an acquisition of control under § 5(2)." 353 U.S. at 166, 169-170. The Court further stated that:

> . . . a non-carrier may not "gain control" over carriers free of Commission regulation merely by operating through subsidiaries. The crux of each inquiry to determine whether there has been an "acquisition of control" is the nature of the change in relations between the companies whose proposed transaction is before the Commission . . . This is the issue and not the immediacy or remoteness of the parent from the proposed transaction, for, as we said in the Marshall Transport Case, the parent can always, by operating through subsidiaries, make itself more remote.

Id. at 169.

In *County of Marin v. U.S.*, *supra*, the Court held that the ICC erroneously assumed jurisdiction under Section 5(2) of a motor carrier's transfer of its intrastate operations to a newly-formed, wholly-owned, subsidiary which was designed to avoid certain state regulation of the original company's intrastate operations. The Court rejected the Commission's view that the transaction involved the parent corporation's acquisition of control of the newly-formed subsidiary which would have

been subject to Commission approval under Section 5(2), again noting that the applicability of Section 5(2) depended upon "the nature of the changed relation between the companies." 336 U.S. at 419, *quoting Allegheny Corp. v. Breswick & Co.* Applying that standard, the Court concluded that the transfer of operating rights did not involve acquisition of control of a carrier since the subsidiary was "a mere corporate shell without property or function, [which] can by no stretch of the imagination be deemed a carrier," and since, even considering the circumstances after the transaction was consummated and [the newly-formed subsidiary] became a carrier, "the alleged 'acquisition' amounts to little more than a paper transaction. In reality the carriers propose a split-up something beyond the purpose and language of § 5(2)(a)." *Id.* at 418.

In *Gilbertville Trucking Co. v. United States, supra*, the Court affirmed the ICC's disapproval of a proposed merger of two carriers because it had found that the two carriers had previously been commonly controlled without prior ICC approval. The Court described the importance Congress attached to the regulation of acquisitions of control of carriers and Congress' persistent efforts to insure adequate regulation of all aspects of control transactions. Thus, the Court stated that Section 5 of the ICA was a "comprehensive legislative scheme designed to place ownership, management and operational control over common carriers within the regulatory jurisdiction of the Commission," and that Section 5 had been amended in 1940 to "reach[] the elaborate corporate devices used to centralize control over the railroads 'without Commission supervision and in defiance of the will of Congress.'" The Court further noted that "[a]lthough Congress had intended the Transportation Act of 1920 to provide complete supervision, the Act proved inadequate to reach the holding company system." 371 U.S. at 124-125 (footnotes to Committee Reports and Hearings on the 1940 Act omitted).

The common thread in those decisions is the Court's repeated admonition that ICC oversight of transactions involving rail carriers must be determined by the "actualities of intercorporate relationships" (*Marshall Transport*, 322 U.S. at 38) and by the "nature of the proposed transaction itself" (*Allegheny v. Breswick*, 353 U.S. at 169). The Court also consistently recognized the importance of vigilant ICC scrutiny of the use of holding companies and subsidiary corporations to affect the outcome of ICC regulation.

The relevance of those decisions to the instant cases is not diminished by differences in the facts. In those decisions, this Court was dealing not only with specific forms of manipulation of ICC regulation, but also with the manner in which regulation of transactions between carriers, or involving control of carriers, must be performed, and specifically, all forms of acquisitions of control of rail carriers. *See, e.g., Gilbertville Trucking*, 371 U.S. at 125. Thus, the fact that *Marshall Transport* involved acquisition of control of an entire carrier, whereas the instant cases involve acquisitions of parts of carriers which would become separate carriers, does not diminish that decision's applicability to the instant cases. The rationale for the Court's holding that a corporation which controls a carrier may not obtain control over another carrier by obtaining its railroad property without ICC approval under Section 5 certainly applies where part of a carrier's railroad property is being acquired in order to form a new carrier, since the end result of both types of transactions is the acquisition of control of an additional carrier by a corporation which already controls a carrier. As the Court stated in *Marshall Transport*, the statute is "concerned not merely with the acquisition of control of one corporation by another but with the acquisition of control of a corporation which is doing the business of a carrier." 322 U.S. at 39.

Similarly, the fact that *County of Marin* involved an attempt to describe as a carrier a newly-formed subsidiary of a carrier in order to invoke ICC jurisdiction under Section 5 does not render that decision inapplicable here, where corporations which control carriers have attempted to evade ICC approval of their acquisitions of control over additional rail lines under Sections 11343 and 11344 by formation of new subsidiaries described as non-carriers. The basis for the decision in *County of Marin* was that the newly-formed subsidiary could not be considered to be separate from its parent such that the transaction between them was not a transaction under Section 5. Under that reasoning, an acquisition of rail lines by a newly-formed subsidiary of a corporation must be considered an acquisition by the corporation, since the transaction to be regulated under the ICA is not the relationship between the parent and the new subsidiary, but the acquisition of control of a carrier through the formation and use of the subsidiary to acquire rail lines. Thus, *Marshall Transport* and its progeny extend beyond their specific facts and enunciate basic principles concerning interpretation of Sections 11343 and 11344 which are applicable in these cases.

The force of the *Marshall Transport* line of cases also has not been affected by deregulation of the railroad industry. Those decisions have never been overruled or limited. Furthermore, neither the 1976 nor the 1980 amendments to the ICA altered Sections 11341-11347 in any way which would diminish the force of those decisions, or which would indicate that Congress intended Section 11343 and the Section 11344 authorization processes to be read narrowly rather than broadly, so that transactions formerly subject to Section 5 could be accomplished under some other section of the statute. Nor can such an intention be inferred from Congress' efforts to streamline the regulatory process; a desire to streamline the *process* of regulation does not suggest a desire to remove a matter from statutory jurisdiction.

Accordingly, the Commission was bound by the holdings of this Court in the *Marshall Transport* line of cases.

The "actualities of intercorporate relationships" and the true nature of the transactions involved in these cases demonstrate that the acquisitions of rail lines by FRVR and B&P were effectively single Section 11343 transactions, completed in two steps, whereby rail lines were sold by carriers to systems of carriers. This is evident not only from the extremely close control and shared management of the commonly controlled corporations, and by the complete dependence of the subsidiaries upon their parents for the financing necessary to actually effect the acquisitions, but also by the physical connections between the newly-formed entities and their affiliates. Accordingly, the Commission's treatment of the acquisitions and the control authorizations as entirely separate transactions, its conclusion that the acquisitions could be treated as non-carrier acquisitions and its conclusion that the selling carirers were not involved in the control transactions were in direct conflict with *Marshall Transport* and its progeny. Furthermore, the Commission's deviation from this Court's precedent was compounded by its violation of Section 11347, since the employees who worked on the transferred lines were denied protections which were required by Section 11347 because of the linkage between the acquisitions and the control relationships.

In its acquisition decisions, the Commission allowed superficial indications of separation between newly-formed subsidiaries and their affiliates and parents, as well as the manner in which transactions were presented, to determine the outcome of regulation. The Commission determined that the FRVR-CNW and B&P-CSXT transactions were not carrier acquisitions of rail lines from carriers because FRVR and B&P were separate legal entities from their parents and affiliates, and because after being capitalized and guaranteed by their parents for the loans utilized in the acquisitions of their railroad businesses, FRVR and B&P were responsible for their

own day to day obligations and were held out as separate entities for the purpose of limiting any potential liability to their parents and affiliates. App. A at 13-15, App. C at 7-8, App. D at 8-9.

By focusing on these superficial indications of independence the Commission failed to attach significance to the facts that FRVR and B&P were formed by corporations which already controlled carriers exclusively for the purposes of acquiring the lines of existing rail carriers which connected to existing subsidiary carriers, their parent corporations provided the capital for the acquisitions and guaranteed the loans used by the newly-formed corporations to acquire their rail property, the lines that they acquired provided their affiliates with access to major markets (GB&W to Milwaukee and R&S and P&S to Pittsburgh) through interchange with corporate relatives, the connections between the new and old subsidiaries allowed joint marketing, joint routing and sharing of equipment and the subsidiaries shared officers and management.[4] When all of these facts are considered in light of the requirement that the Commission must consider the actualities of the intercorporate relationships and the true nature and practical effects of these transactions, it is clear that although FRVR and B&P were technically separate entities from their parents and affiliates, their acquisitions of CNW's and CSTX's rail lines were actually sales of rail lines by carriers to systems of carriers under Section 11343.[5]

---

[4] Rail Labor does not contend that a connection between a newly-formed corporation and an affiliate is necessary for the new corporation to be treated as a carrier, but Rail Labor does contend that such a connection is a compelling reason for treatment of the new corporation as a carrier.

[5] That FRVR and B&P were lawfully incorporated and are distinct corporations for purposes of state law, as well as for limitation of liability of their parent companies, cannot justify the ICC's refusal to treat them as carriers under the ICA because of their relationships with their parents and affiliates. This Court has consistently

Thus, by treating the FRVR-CNW and B&P-CSXT transactions as non-carrier acquisitions under Section 10901, the ICC allowed the corporate parents of FRVR and B&P to form interlocking rail systems by piecing together the rail lines of controlled subsidiaries without ICC approval of their acquisitions of control over additional carriers under Sections 11343 and 11344.[6] Furthermore, by allowing this manipulation of its processes, the Commission allowed these transactions to be consummated without the employee protective arrangements which Congress has explicitly required to be imposed in Section 11343 transactions to mitigate the effects of these transactions upon employees. Thus, the Commission's decisions in the acquisition cases conflicted with the requirements of *Marshall Transport* and its progeny, and that departure from this Court's precedent resulted in violations of Sections 11343 and 11347.

In the control decisions, the Commission ignored the requirements of *Marshall Transport* and its progeny by holding that the control transactions involved only the commonly controlled corporations and did not involve the acquisitions of rail lines. However, the only reason that ICC authorization of the control transactions was necessary was because the new subsidiaries were acquiring

---

held that the outcome of Federal regulation may not be determined by corporate formalities, however valid they may be under state law. *County of Marin, supra, Electric Bond & Share Co. v. SEC*, 303 U.S. 419, 440 (1938), *Anderson v. Abbott*, 321 U.S. 349, 363 (1943); *cf. Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946).

[6] Although it has never done so previously, the Commission may argue that it did consider these transactions as involving the acquisition of control of rail lines because it authorized the continued control of FRVR and B&P by their parents after they began operations. However, such a contention would be inconsistent with the Commission's holdings in those decisions that employees of CNW and CSXT were not covered by the employee protections imposed in the control decisions because the acquisitions involved different issues than the control decisions and the control relationships affected only employees of the commonly controlled carriers. App. C at 3; App. D at 9.

rail lines and would become carriers. As the Court observed in *Marshall Transport*, the ICA is concerned not with control of corporations but with control of carriers. 322 U.S. at 39. And, as in *County of Marin*, there would have been no ICA control transactions if these cases involved only the parent corporations' acquisition of control over newly formed subsidiaries.

Thus, ICC authorization of the control relationships was required only because the subsidiaries were acquiring lines of a railroad and were becoming rail carriers so that the parent corporations were acquiring control over additional rail carriers. Indeed, the ICC itself stated that its authorization of the control relationship was necessary because the subsidiaries would become carriers. *FRVR* J.A. at 40; *B&P* J.A. at 41. Furthermore, because of the necessity for the capital contributions and the guaranteeing of the loans to the new subsidiaries by their parents, the acquisitions were entirely dependent on the intercorporate relationships. Therefore, by failing to recognize the linkage between the acquisitions and the control relationships, and by limiting the scope of the statutorily mandated employee protective arrangements to employees of the commonly controlled carriers, the Commission ignored the true scope of these transactions. Additionally, the Commission violated the express requirement of Section 11347 that it require the provision of arrangements to protect employees of carriers which are "involved" in Section 11343 transactions.

Ultimately, regardless of how the Commission explains its control decisions, it cannot demonstrate that it has applied the Act in compliance with the precedent of this Court and in a manner consistent with the express requirements of the Act. If a carrier selling rail lines to a newly-formed, controlled entity is not involved in the proceeding concerning the control of that acquiring entity, it cannot be said that the Commission has actually authorized the parent corporation's acquisition of control

of an additional rail operation. Conversely, if it is said that the Commission's authorization of the control of the acquiring entity implicitly considered the propriety of the parent corporation's acquisition of an additional railroad operation, it cannot be said that the vendor in the line sale is not "involved" in the control decision within the meaning of 49 U.S.C. § 11347; and the employee protections imposed in the control decision pursuant to that Section must apply to the employees of the vendor because of its involvement in that transaction.

The Commission's conclusions that CNW and CSXT employees were not involved in the control transactions because CNW and CSXT were not parties to the control proceedings were based upon decisions in merger cases which restricted the employee protective arrangements imposed in those mergers to employees of parties to the mergers and excluded employees of the competitors of the merging carriers.[7] However, those decisions do not support the ICC's decisions in the control cases that CNW and CSXT were not "involved" in the control transactions within the meaning of Section 11347. A determination that competitors of merging carriers are not involved in a merger does not support a conclusion that employees of railroads which are selling rail lines to commonly controlled carriers are not involved in the Commission's authorizations of the control relationships upon which the acquisitions depend. Moreover, Rail Labor respectfully submits that the decisions in the merger cases improperly vitiated the requirement of the first sentence of Section 11347, which provides that protections must be imposed for the benefit of employees of *a* rail

---

[7] *Burlington Northern, Inc.—Control & Merger—St. Louis San Fran. Ry.*, 360 I.C.C. 784 (1980), *aff'd sub nom. Missouri-Kansas-Texas R.R. v. United States*, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 411 U.S. 1017 (1981); *Guilford Transportation Industries, Inc.—Control B&M Corp.*, 366 I.C.C. 292 (1982), *aff'd sub nom. Lamoille Valley R.R. Co. v. ICC*, 711 F.2d 295 (D.C. Cir. 1983) and *Crounse Corp. v. ICC*, 781 F.2d 1176-1193 (6th Cir.), *cert. denied*, 479 U.S. 890 (1986).

carrier "involved" in a transaction, by limiting the scope of that requirement because the second sentence of Section 11347 refers in the singular to protective arrangements made by "*the* rail carrier" and the "authorized representative of *its* employees"; *see* App. A at 9-10, *quoting Lamoille Valley R.R., supra.*

The language cited by the ICC and the court of appeals became part of the statute in the 1978 recodification of the ICA, in which former Section 5(2)(f) became Section 11347. Section 5(2)(f) did not utilize singular forms when discussing arrangements implementing the protective conditions; rather Section 5(2)(f) referred to the carrier *or carriers* and to the representative *or* representatives of its or *their* employees.[8] Since the 1978 recodification was intended to "restate, without substantive change" the prior version of the ICA, and since the recodification "may not be construed as making a substantive change in the laws replaced" (Pub. L. 95-473 § 3(a), 92 Stat. 1466, October 17, 1978), the Commission was simply wrong in inferring from the language of the second sentence of Section 11347, an intention of Congress to restrict its scope to the employees of the carriers which are parties in the proceeding in which protections were imposed.[9] Accordingly, the precedent relied upon by the

---

[8] Section 5(2)(f) provided that as a condition of its approval of a covered transaction "involving a *carrier or carriers* by railroad . . . the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. . . . Notwithstanding any other provisions of this subchapter . . ., an agreement pertaining to the protection of the interests of employees may hereafter be entered into by a *carrier or carriers* by railroad and the duly authorized *representative or representatives* of *its or their* employees." (emphasis added). 41 Stat. at 456 (1940).

[9] Rail Labor does not here challenge the decisions in the merger cases. Whether competitor carriers are involved in a merger is a far different question from whether a carrier selling a line of railroad to a controlled entity is involved in the control transaction upon which the acquisition depends.

Commission does not support its restriction of the scope of the protections imposed in the control cases.[10] Moreover, Rail Labor submits that the ICC's reliance upon the revised language of Section 11347 to significantly alter the meaning of that section provides an additional reason for granting this petition because of its abuse of the recodification process.

The court of appeals' decisions in these cases relied heavily upon the principle that reviewing courts must defer to agency interpretations of statutes when the statutes are silent or ambiguous. App. A at 8, *citing Chevron USA, Inc. v. NRDC Inc.*, 467 U.S. 837, 843 and 11 (1984). However, in *Chevron* this Court also stated that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear Congressional intent." *Id.* at 853 n.9 (*citations omitted*). And in *County of Marin*, *supra*, the Court stated that "[w]hile the interpretation given a statute by those charged with its application and enforcement is entitled to considerable weight, it is hardly conclusive." 356 U.S. at 420, *citing United States v. Missouri Pac. R.R.*, 278 U.S. 269, 280 (1929). In *Marshall Transport* and its progeny, this Court repeatedly explained what Congress intended with respect to ICC regulation of transactions between carriers and involving the control of carriers, especially when such transactions involved holding companies and subsidiaries. Indeed, it was because of this repeated and clear explication of the purposes of the statute that this Court re-

---

[10] Indeed, as Rail Labor argued below, until recently, the ICC had held that a carrier need not be a party in order to be "involved" in a transaction within the meaning of Section 11347 and that where two transactions are parts of an "inseparable plan" employee protections imposed in one transaction are applicable to employees who are affected by the related transaction. Rail Labor submits that because Section 11347 requires the ICC to impose protective arrangements at least as protective as those imposed in 1976, the ICC's failure to apply that precedent in these cases violated § 11347.

versed the ICC's decision in *County of Marin*. Rail Labor respectfully submits that, as in *County of Marin*, the Court should not defer to the ICC's construction of the statute in these cases because of the ICC's blatant disregard for the language and purpose of the statute as explained by this Court, and because the ICC's failure to abide by applicable precedent of this Court has allowed the evasion of the express congressional mandate for imposition of employee protective arrangements in cases such as these. Rail Labor further submits that review of the decision below is therefore appropriate and necessary.

II. BECAUSE THESE CASES INVOLVE AN ISSUE IMPORTANT TO THE ENTIRE RAILROAD INDUSTRY, THE COURT SHOULD GRANT THIS PETITION TO AGAIN CLARIFY THE REQUIREMENTS OF THE ICA CONCERNING TRANSACTIONS BETWEEN RAIL CARRIERS AND INVOLVING CONTROL OF RAIL CARRIERS TO REQUIRE THAT THE ICC INSURE FULL COMPLIANCE WITH THOSE REQUIREMENTS

The Court has several times found it necessary to address the proper interpretation of Sections 11343 and 11344 of the ICA because of the importance of those provisions to that statute, and because of an historic pattern of efforts to evade or manipulate regulation under those provisions through the use of holding companies and subsidiary corporations. Rail Labor respectfully submits that it is again necessary for the Court to address that question because the decisions below demonstrate that the Court is again faced with efforts to evade and manipulate regulation under Sections 11343 and 11344.

The need for review of these decisions is amplified by the fact that the ICC has countenanced these abuses of the statute based upon a policy determination that imposition of employee protective arrangements would discourage sales of "marginally profitable" rail lines. App. E at 67a. However, as is discussed above, the ICA does not allow the Commission to treat a Section 11343 trans-

action as a Section 10901 transaction because that agency feels that the cost of employee protection would inhibit what it might perceive to be a desirable transaction. Rather, the statute requires that particular types of transactions be authorized under Sections 11343 and 11344 and that such transactions must be conditioned upon provision of arrangements for the protection of employees of carriers involved in those transactions; and this court has repeatedly held that the scope of Sections 11343 and 11344 must be construed broadly. Furthermore, the ICA has not been amended to narrow the scope of Section 11343, 11344 or 11347, or to vitiate the force of this Court's decisions concerning those provisions. Thus, the ICC's effort to advance its own policy objectives without regard for the requirements of the statute and the precedents established by this Court necessitate review of the decisions below.[11]

The ICC has provided additional impetus for review of the decisions in the instant cases by its conflicting applications of the statute in similar situations. In two recent decisions the ICC has authorized, under Section 11343, acquisitions of rail lines by newly-formed subsidiaries of a corporation which controls carriers in circumstances virtually identical to the instant cases, based upon the subsidiaries' parent's willingness to allow the subsidiaries to be treated as carriers. *Rio Grande Indus., Inc.—Purchase and Related Trackage Rights—Soo Line Between Kansas City, Mo. and Chicago, Ill.*, Finance Docket No. 31505 Decision No. 6 (served November 15, 1989) (unreported); *Rio Grande Indus., Inc.—Purchase and Track-*

[11] Rail Labor submits that the ICC's general policy of encouraging new entrants to the railroad industry (*see Black v. ICC*, 762 F.2d 106, 115 (D.C. Cir. 1985), is not involved in these cases since the issue here concerns whether FRVR and B&P can be considered new entrants, given that they are completely controlled by corporations which already control carriers and that the lines they acquired connect with the lines of corporate affiliates which are existing carriers. Thus, whatever the merits of that policy may be, they are irrelevant to any issue in these cases.

age Rights—Chicago, Missouri & Western Ry. Co., 5 I.C.C.2d 952 (1989). In both cases the Commission rejected claims that, under the indicia of independence test applied in the instant cases, the newly-formed subsidiaries were required to be treated as non-carriers so the transactions were subject to authorization under Section 10901. Thus, in *Rio Grande Industries—Chicago, Missouri and Western*, the ICC stated that "[a]pplicants having filed under § 11343 and therefore having conceded carrier status; they are entitled to judgment on the transaction accordingly." 5 I.C.C.2d at 967 n.15; *see also Rio Grande Industries—Soo Line* at 4-5.

Another example of the ICC's inconsistent handling of acquisitions of rail lines by newly-formed subsidiaries of corporations which control carriers is the currently pending case, *Chesapeake and Albemarle R.R., Inc.—Lease Acquisition and Operation Exemption—Southern Ry.*, Finance Docket No. 31617. There, an existing carrier which was a subsidiary of a holding company sought to acquire a rail line from a carrier pursuant to Section 11343. Sometime after the filing of the Section 11343 application, the carrier subsidiary withdrew its application and a newly-formed subsidiary of the same holding company effected the acquisition of the same rail line under the same agreement pursuant to Section 10901 and an *Ex Parte 392* exemption. The asserted reason for the change in the acquiring subsidiary was a claim that delays in processing of the Section 11343 application necessitated the change to an acquiring entity that could take advantage of the *Ex Parte 392* class exemption, which allowed almost immediate consummation. Moreover, the new subsidiary's parent corporation exercised control of the new carrier without any ICA authority. In contrast to *Gilbertville Trucking Co., supra*, where the Commission itself rejected a merger because of prior unauthorized control, in *Chesapeake and Albemarle* the Commission has taken no action to enforce the provisions of Section 11343 dealing with control of carriers. Rail Labor

has challenged this transaction as both an improper use of Section 10901 and an unlawful acquisition of control of a carrier. In view of these several recent transactions, it is apparent that the ICC's application of the statute in cases such as these depends upon the preferences of the applicants, and not upon a principled analysis of the statute. The ICC's inconsistent interpretation of the statute accentuates the need for this Court's review of the decisions below to clarify the manner in which these transactions are to be regulated.

Rail Labor submits that it is necessary for the Court to address these questions in the current cases because they do not represent isolated abuses of the statute but continuing industry practice through which holding companies are acquiring lines of railroad to create interlocking systems without Commission authorization for their acquisition of control over those lines. As is noted above, GWI initially obtained control of an additional line of railroad, the R&S, which was several times the size of its existing carriers and which connected with those carriers through the same procedures as were utilized in the instant cases; GWI then allowed B&P to exercise a right of first refusal obtained in the R&S transaction in order to acquire the lines which connected with the R&S. Under the Commission's decisions in these cases GWI could connect its New York and Louisiana railroads through acquisitions by newly-formed subsidiaries without ever having the acquisition of control of the components of such a system reviewed under Section 11343. Indeed, acquisition of control of a large scale system was obtained by this method in *Southeastern Rail Corp.—Acquisition and Operation Exemption—Gulf and Mississippi R.R.*, Finance Docket No. 31187 (served August 31, 1989), *aff'd sub nom. BLE v. ICC*, 909 F.2d 909 (6th Cir. 1990), and *MidSouth Corp. Continuance In Control Exemption—Southeastern Rail Corp.*, Finance Docket No. 31186 (served February 12, 1988), *aff'd sub nom. Railway Labor Executives' Ass'n v. ICC*, 869 F.2d 1492

(6th Cir. 1989) (Table). In that transaction, the Mid-South Corporation utilized a newly-formed subsidiary to acquire railroad lines which connected with its existing subsidiary carriers to form an interlocking system of over 1200 miles with combined revenue of a Class II carrier; this acquisition of control of these new lines was accomplished without ICC authorization under Section 11343. Thus, the instant cases do not involve isolated problems but represent growing practice in the industry which will affect large numbers of employees and many communities and shippers throughout the nation.

Rail Labor seeks this Court's review of the decisions below because these manipulations of the ICA, which mirror those which this Court has previously rebuffed, have resulted in the denial of employee protective benefits which Congress specifically mandated in transactions like those at issue here. However, Rail Labor also submits that the decisions below have consequences beyond the interests of the employees who have been unlawfully denied benefits. As is demonstrated above, the manipulation of the statute and evasion of regulation through the use of holding companies and subsidiary corporations has a long history and Congress has consistently sought to structure the statute to ensure that transactions between rail carriers and acquisitions of control of rail carriers will be subject to ICC approval under the standards set forth in 49 U.S.C. § 11344. In doing so, Congress was concerned not just with the interests of rail employees but also with the interests of all who depend upon rail transportation.

If the ICC allows transactions between rail carriers and acquisitions of control of rail carriers to be accomplished without compliance with Section 11344, in order to relieve the participants in those transactions of their obligations under Section 11347, the entire congressional purpose in regulation of such transactions will also be defeated. In evading Section 11347, the participants in

those transactions will be evading examination under Section 11344, which requires ICC consideration of the financial viability of applicants. While the failures of individual carriers which have begun operations under *Ex Parte 392* exemptions will present difficulties, failures of entire systems which have been pieced together through *Ex Parte 392* exemptions will obviously have more serious consequences. Accordingly, Rail Labor respectfully submits that the Court should grant this petition to ensure, as it has done in the past, that the ICA is interpreted and applied in the manner intended by Congress.

CONCLUSION

For the reasons stated herein, petitioners respectfully request that the Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review and vacate the judgments of that court in *Railway Labor Executives' Ass'n and United Transportation Union v. ICC*, *supra*, and *Railway Labor Executives Ass'n v. ICC*, *supra*.

Respectfully submitted,

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.
RICHARD S. EDELMAN *
HIGHSAW, MAHONEY &
CLARKE, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500
Attorneys for Petitioners

Of Counsel:

DONALD F. GRIFFIN
HIGHSAW, MAHONEY &
CLARKE, P.C.

Date: January 14, 1991

* Counsel of Record